No. 10-1491

In the Supreme Court of the United States

ESTHER KIOBEL, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND, DR. BARINEM KIOBEL, ET AL., PETITIONERS

v.

ROYAL DUTCH PETROLEUM CO., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN PARTIAL SUPPORT OF AFFIRMANCE

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QUESTION PRESENTED

Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.

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INTEREST OF THE UNITED STATES

This Court directed the parties to file supplemental briefs addressing whether and under what circumstances the Alien Tort Statute (ATS), 28 U.S.C. 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States. The United States has an interest in the proper application of the ATS because such actions can have implications for the Nation's foreign relations, including the exposure of U.S. officials and nationals to exercises of jurisdiction by

foreign states, for the Nation's commercial interests, and for the enforcement of international law.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court explained in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712, 724 (2004), that the ATS "is in terms only jurisdictional" and does not create a statutory cause of action. The ATS does permit courts to create a federal common-law cause of action for violations of international law in certain limited circumstances. But any such cause of action is not created or prescribed by international law. Rather, a private right of action fashioned by a court exercising jurisdiction under the ATS constitutes application of the substantive and remedial law of the United States, under federal common law, to the conduct in question—albeit based on an alleged violation of an international law norm. See *id.* at 712, 720, 721, 724, 725-726, 729-730, 731 & n.19, 732, 738.

In *Sosa*, the Court made clear that, at a minimum, "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than [the three] historical paradigms"—violation of safe conducts, infringement of the rights of ambassadors, and piracy. 542 U.S. at 724, 732. In setting forth that threshold requirement, the Court did not purport to define a full set of "criteria for accepting a cause of action subject to jurisdiction under [Section] 1350." *Id.* at 732; see *id.* at 733 n.21 ("This requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law."); *id.* at 738 n.30 (noting that the "demanding

standard of definition" must first "be met to raise even the possibility of a private cause of action").

The relevant question is whether a court should create a federal common-law cause of action *today* to redress an alleged international law violation, in light of present-day criteria for recognizing private rights of action and fashioning federal common law. The text of the ATS, a jurisdictional statute, does not answer that question. Courts, however, should be guided at least in general terms by the legislative purpose to permit a tort remedy in federal court for law-of-nations violations for which the aggrieved foreign nation could hold the United States accountable, which is an important touchstone for determining whether U.S. courts should be deemed responsible for affording a remedy under U.S. law. See *Sosa*, 542 U.S. at 714-718, 722-724 & n.15. And while canons of statutory construction, such as the presumption against extraterritorial application of an Act of Congress, see *Morrison* v. *National Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877-2878 (2010), are not directly applicable to the fashioning of federal common law, the underlying principles counsel similar restraint in the judicial lawmaking endeavor.

Although the Court in *Sosa* did not attempt to delineate all of the factors courts exercising jurisdiction under the ATS should consider in deciding whether to "recognize private claims under federal common law," 542 U.S. at 732, it did provide some guidance. The relevant considerations include the modern conception of the common law; evolution in the understanding of the proper role of federal courts in making that law; the general assumption that the creation of private rights of action is "better left to legislative judgment," including the decision whether "to permit enforcement without the

check imposed by prosecutorial discretion"; "the potential implications for the foreign relations of the United States"; concerns about "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs"; and the absence of a congressional mandate. *Id.* at 725-728. Courts should also consider "the practical consequences" of making a "cause [of action] available to litigants in the federal courts," *id.* at 732-733; exercise "great caution in adapting the law of nations to private rights," *id.* at 728; and operate under a "restrained conception" of their "discretion" to consider "a new cause of action of this kind," *id.* at 725.

There is no need in this case to resolve across the board the circumstances under which a federal common-law cause of action might be created by a court exercising jurisdiction under the ATS for conduct occurring in a foreign country. In particular, the Court should not articulate a categorical rule foreclosing any such application of the ATS. *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), for example, involved a suit by Paraguayan plaintiffs against a Paraguayan defendant based on alleged torture committed in Paraguay. The individual torturer was found residing in the United States, circumstances that could give rise to the prospect that this country would be perceived as harboring the perpetrator. And Congress, in the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (28 U.S.C. 1350 note), subsequently created an express statutory private right of action for claims of torture and extrajudicial killing under color of foreign law—the conduct at issue in *Filartiga*.

This Office is informed by the Department of State that, in its view, after weighing the various considerations, allowing suits based on conduct occurring in a

foreign country in the circumstances presented in *Filartiga* is consistent with the foreign relations interests of the United States, including the promotion of respect for human rights. For this reason, and because Congress has created a statutory cause of action for the conduct at issue in *Filartiga*, there is no reason here to question the result in that case. Other claims based on conduct in a foreign country should be considered in light of the circumstances in which they arise.

In the circumstances of this case, the Court should not fashion a federal common-law cause of action. Here, Nigerian plaintiffs are suing Dutch and British corporations for allegedly aiding and abetting the Nigerian military and police forces in committing torture, extrajudicial killing, crimes against humanity, and arbitrary arrest and detention in Nigeria. Especially in these circumstances—where the alleged primary tortfeasor is a foreign sovereign and the defendant is a foreign corporation of a third country—the United States cannot be thought responsible in the eyes of the international community for affording a remedy for the company's actions, while the nations directly concerned could. A decision not to create a private right of action under U.S. law in these circumstances would give effect to the Court's admonition in *Sosa* to exercise particular caution in deciding whether, "if at all," to consider suits under rules that would "claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits." 542 U.S. at 727-728.

ARGUMENT

A COURT MAY IN APPROPRIATE CIRCUMSTANCES FASHION A FEDERAL COMMON-LAW CAUSE OF ACTION BASED ON THE ALIEN TORT STATUTE FOR CERTAIN EXTRATERRITORIAL VIOLATIONS OF THE LAW OF NATIONS, BUT A PRIVATE RIGHT OF ACTION IS NOT AVAILABLE UNDER THE CIRCUMSTANCES OF THIS CASE

A. There Are Circumstances In Which A Court May Recognize A Federal Common-Law Cause Of Action Based On The ATS For Extraterritorial Violations Of The Law Of Nations

A close examination of the historical context and purposes of the ATS, the modern-day line of cases, and congressional action suggests that there are circumstances in which it would be appropriate for a court to recognize a cause of action based on the ATS for violations of international law occurring outside the United States. But the question whether a court should fashion a federal common-law cause of action under the ATS for a violation of the law of nations occurring in the territory of a foreign sovereign calls for an assessment of a variety of factors and does not necessarily lead to one uniform conclusion.

1. As explained in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 724 (2004), piracy is one of the paradigmatic torts in violation of the law of nations and one of the specific offenses for which "the First Congress understood that the district courts would recognize [a] private cause[] of action." Piracy is an offense that typically occurs on the high seas, *i.e.*, outside the territorial jurisdiction of any state. See Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 113-114 (criminalizing "piracy" defined as "murder or robbery, or any other offence which if committed

within the body of a county, would by the laws of the United States be punishable with death" if committed "upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state"); 4 William Blackstone, *Commentaries on the Laws of England* 72 (1769) (defining piracy as "those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there"); see also *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 160-162, 163 n.a (1820). Accordingly, courts may appropriately fashion a federal common-law cause of action for piracy and, perhaps, other law-of-nations violations occurring outside the territorial jurisdiction of *any* sovereign.

As to whether violations occurring within the territory of a foreign sovereign would also have given rise to a cause of action cognizable under the ATS, the early history is sparse. Attorney General William Bradford's 1795 opinion considered the possibility of prosecuting American citizens who had taken part in the attack by a French fleet on a British slave colony in Sierra Leone. 1 Op. Att'y Gen. 57, 58. Based on the diplomatic correspondence submitted to Attorney General Bradford and certain language in the opinion itself, it appears that the alleged unlawful acts occurred in part on land. *Ibid.* (noting that the attack was on "the settlement" and involved the "plundering" and destruction of property "on that coast"); see Pet. Supp. Br. App. B1-B3 (describing capture of Freetown and Bance Island and noting that American citizens had "land[ed]" in Freetown and that, "with arms in his hands," one American had headed to "the house of the acting Governor"). Attorney General Bradford explained that criminal prosecution was not an option to the extent "the transactions complained of

originated or took place in a foreign country," and expressed "some doubt" as to whether it would be possible to prosecute the Americans criminally if the "crimes [were] committed on the high seas." 1 Op. Att'y Gen. at 58-59. In contrast, he opined, "there can be no doubt that" those injured by the American citizens' "acts of hostility have a remedy by a *civil* suit in the courts of the United States" under the jurisdiction granted by the ATS. *Id.* at 59. It is not entirely clear whether Attorney General Bradford believed that federal courts would be open to entertain a tort action under the ATS for an attack occurring within the territory of a foreign sovereign, or only for conduct occurring on the high seas. But he plainly knew that some of the conduct at issue occurred within the territory of Sierra Leone, and his reference to "acts of hostility" for which the ATS afforded a remedy could have been meant to encompass that conduct. *Ibid.*[1]

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[1] The United States advanced a different reading of the 1795 opinion in a previous submission to this Court. See U.S. Amicus Br. at 15-16, *American Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919) (asserting that Bradford's opinion stood for the proposition that an "ATS suit could be brought against American citizens for breaching neutrality with Britain only if acts did not 't[ake] place in a foreign country'") (quoting 1 Op. Att'y Gen. at 58-59) (brackets in original); see also *id.* at 13. On further reflection, and after examining the primary documents, the United States acknowledges that the opinion is amenable to different interpretations. Another source of ambiguity (recognized by the Court in *Sosa*, 542 U.S. at 721) is whether the opinion implicates the ATS's "law of nations" provision at all, or whether the offense involved violation of a treaty. See 1 Op. Att'y Gen. at 58; *Sarei* v. *Rio Tinto, PLC*, 671 F.3d 736, 811 (9th Cir. 2011) (en banc) (Kleinfeld, J., dissenting), petition for cert. pending, No. 11-649 (filed Nov. 23, 2011).

The events leading up to the passage of the ATS (the "so-called Marbois incident" involving an assault in Philadelphia on the Secretary to the French Legation, and the episode that ensued when a New York constable entered the residence of a Dutch diplomat to serve process) both occurred within the territory of the United States. See *Sosa*, 542 U.S. at 716-717; William R. Casto, *The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 491-494 (1986). But the circumstances in which a cause of action in a U.S. court might have been deemed appropriate to adjudicate an action alleging that a person violated the law of nations, and to hold the perpetrator accountable under U.S. law, see *Sosa*, 542 U.S. at 714-718, 722-724 & n.15, would not necessarily have been limited exclusively to conduct occurring in U.S. territory. After all, the Sierra Leone episode (which clearly occurred outside the territory of the United States and appears to have occurred, at least in part, within the territory of a foreign sovereign) prompted a formal protest from Great Britain regarding the role of American citizens in the attack. Cf. *Sarei* v. *Rio Tinto, PLC*, 671 F.3d 736, 802 (9th Cir. 2011) (en banc) (Kleinfeld, J., dissenting) (noting that "[t]he concern was that U.S. citizens might engage in incidents that could embroil the young nation in war and jeopardize its status or welfare in the Westphalian system") (citation omitted), petition for cert. pending, No. 11-649 (filed Nov. 23, 2011); *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 783 (D.C. Cir. 1984) (Edwards, J., concurring) (suggesting that "[t]he focus of attention * * * was on actions occurring within the territory of the United States, or perpetrated by a U.S. citizen, against an alien"), cert. denied, 470 U.S. 1003 (1985).

2. Modern litigation under the ATS has focused primarily on alleged law-of-nations violations committed within foreign countries. *Filartiga* v. *Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980), involved allegations of torture committed by a former Paraguayan police inspector against a Paraguayan citizen in Paraguay. And, in the ensuing decades since *Filartiga*, federal courts have either assumed or, in at least one case, expressly held that violations of the law of nations arising in a foreign country could be brought based on the ATS. See *Trajano* v. *Marcos*, 978 F.2d 493, 499-501 (9th Cir. 1992) (holding that "subject-matter jurisdiction" under the ATS was appropriate "even though the actions" of the foreign defendant "which caused" the foreign plaintiff "to be the victim of official torture and murder occurred" in the Philippines), cert. denied, 508 U.S. 972 (1993).[2]

Congress has "expressed no disagreement" with the view that some extraterritorial causes of action may be recognized under the ATS, see *Sosa*, 542 U.S. at 731, either through the passage of prohibitory legislation or otherwise. When it enacted the TVPA, Congress recognized uncertainty in the lower courts about the existence

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[2] More recently, the Ninth Circuit sitting en banc reaffirmed its holding in *Trajano*. See *Sarei*, 671 F.3d at 744-747; *id.* at 780-783 (McKeown, J., concurring in part and dissenting in part). But see *id.* at 797-818 (Kleinfeld, J., dissenting). And the Seventh and D.C. Circuits likewise have concluded that a federal common-law cause of action based on the ATS could be fashioned for at least some extraterritorial violations of the law of nations. See *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 20-28 (D.C. Cir. 2011); *Flomo* v. *Firestone Natural Rubber Co.*, 643 F.3d 1013, 1025 (7th Cir. 2011). But see *Doe*, 654 F.3d at 72, 74-81 (Kavanaugh, J., dissenting in part). A petition for a writ of certiorari has been filed in *Sarei* (No. 11-649) and a petition for rehearing en banc has been filed in *Doe* (No. 09-7125 D.C. Cir.).

of a federal cause of action in suits based on the ATS, and it responded by creating an express private right of action specifically for claims of torture and extrajudicial killing under color of foreign law—the conduct at issue in *Filartiga*. The legislative history noted that *Filartiga* had been "met with general approval" and explained that Congress was providing "an unambiguous and modern basis for a cause of action that has been successfully maintained under" the ATS. H.R. Rep. No. 367, 102d Cong., 1st Sess. Pt. 1, at 3-4 (1991) (*House Report*); see S. Rep. No. 249, 102d Cong., 1st Sess. 4-5 (1991) (*Senate Report*). The congressional reports also stated that the ATS should otherwise "remain intact" because "claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by [S]ection 1350." *Senate Report* 5; *House Report* 4.

At the same time, however, Congress did not respond to the uncertainty regarding the existence of a federal cause of action that could be brought under the jurisdictional grant in the ATS by amending the ATS itself to provide a cause of action for any violation of the law of nations or a treaty of the United States; nor did it enact a special statute creating an express private right of action for violations of international law generally. See *Sosa*, 542 U.S. at 728. In the end, then, we think the TVPA, while demonstrating that Congress knew how to create a private right of action in this context when it wanted to do so and that it approved of the result in *Filartiga*—and while perhaps somewhat instructive in other respects—is best regarded as essentially leaving considerations bearing on recognition of a federal common-law cause of action under the ATS where it found them.

Nor do we believe that *Sosa* itself resolves the question whether or when a cause of action should be recognized based on conduct occurring in a foreign country. In *Sosa*, the Court did not disapprove of *Filartiga* or similar ATS cases. And the Court did not suggest that courts lack authority to recognize a federal common-law cause of action based on extraterritorial conduct under any circumstances. The alleged violation before the Court occurred in Mexico (albeit, allegedly at the behest of the United States), *Sosa*, 542 U.S. at 698, 700-701, and the United States had argued that the extraterritorial nature of the conduct presented an "additional reason" to reverse the court of appeals, U.S. Resp. Br. Supporting Pet. at 46-50, *Sosa*, *supra* (U.S. *Sosa* Br.). The Court did not discuss the issue of extraterritoriality, instead disposing of the case on the separate ground that the norm of international law at issue was not sufficiently specific or well defined to be actionable. *Sosa*, 542 U.S. at 731-738.

The Court did note that it would "certainly consider" a requirement that the claimant must have exhausted any remedies in the domestic legal system, and perhaps in other forums such as international claims tribunals, "in an appropriate case." *Sosa*, 542 U.S. at 733 n.21. Because exhaustion of such remedies would be necessary only if a cause of action based on the ATS could be premised on conduct occurring in a foreign country, the *Sosa* Court seemed to contemplate recognition of an extraterritorial cause of action under the ATS in at least some circumstances. But, at the same time, the Court identified factors counseling caution: that creation of a federal cause of action is primarily a legislative function; that suits under the ATS present foreign relations issues; that private litigation is not subject to the exercise

of prosecutorial discretion; and that a common-law cause of action based on allegations concerning a foreign government's treatment of its own people should be created, if at all, only with great caution. See *id.* at 725-728.

Thus, while *Sosa* does not resolve more generally the various questions concerning the fashioning of federal common law under the ATS for conduct occurring in a foreign country, recognizing an extraterritorial cause of action under the ATS in certain circumstances would be consistent with *Sosa*. Moreover, it is the view of the Department of State that recognizing a cause of action in the circumstances of *Filartiga* is consistent with the foreign relations interests of the United States, including the promotion of respect for human rights. The considerations identified in *Sosa* and in this brief should be taken into account in assessing whether a private right of action should be fashioned under U.S. federal common law in suits brought pursuant to the jurisdictional grant in the ATS, based on the circumstances presented.

B. This Court Should Not Fashion A Federal Common-Law Cause Of Action Based On The ATS Under The Circumstances Of This Case

In *Sosa*, this Court urged "great caution" and called for "vigilant doorkeeping" before exercising a court's federal common lawmaking authority to "adapt[] the law of nations to private rights." 542 U.S. at 728, 729. In this case, foreign plaintiffs are suing foreign corporate defendants for aiding and abetting a foreign sovereign's treatment of its own citizens in its own territory, without any connection to the United States beyond the residence of the named plaintiffs in this putative class action and the corporate defendants' presence for jurisdictional purposes. Creating a federal common-law cause of ac-

tion in these circumstances would not be consistent with *Sosa*'s requirement of judicial restraint.[3]

1. The historical context of the ATS lends no support to recognizing a private right of action challenging the acts of a foreign sovereign in its own territory. The two incidents leading up to the enactment of the ATS (the Marbois incident and its "reprise," see *Sosa*, 542 U.S. at 716-717; p. 9, *supra*), both occurred in the United States and did not involve the acts of a foreign sovereign. The few contemporaneous cases referring to the ATS involved violations allegedly committed within the territory of the United States, and neither involved the exercise of jurisdiction over a suit involving the acts of a foreign sovereign in its own territory. See *Bolchos* v. *Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607) (suit brought by French privateer against third party for wrongful seizure of slaves from vessel while in port in the United States); *Moxon* v. *The Fanny*, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895) (dismissing suit, for lack of jurisdiction, brought by owners of British ship for seizure,

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[3] The United States does not suggest that an extraterritorial private cause of action would violate international law in this case. The TVPA, for example, provides an express cause of action against an individual who, under color of foreign law, subjects another individual to torture or extrajudicial killing. TVPA § 2(a), 106 Stat. 73. The TVPA thus plainly contemplates a cause of action based on conduct occurring in a foreign country. See also 18 U.S.C. 2340A. The Court's decision in this case therefore should not cast doubt on the propriety of the United States, through appropriate lawmaking processes, to impose civil or criminal sanctions for torture committed in a foreign country. Cf. *The Paquete Habana*, 175 U.S. 677, 700 (1900). The issue in this case, concerning whether a private right of action should be created by the courts as a matter of federal common law, is instead solely one of the allocation of responsibility among the Branches of the United States Government for creation of private rights of action under U.S. law.

allegedly in United States territorial waters, by French privateer). And the possible ATS suit contemplated by Attorney General Bradford's 1795 opinion would not have entailed an adjudication of the conduct of a foreign sovereign in its own territory (*i.e.*, the British Government in Sierra Leone). See 1 Op. Att'y Gen. at 59. The suit he apparently had in mind would instead have been brought against the American citizens.

Moreover, as a general matter, the First Congress likely believed that U.S. courts should not judge a foreign sovereign's actions within its own territory through private civil suits. See Letter of George Washington to James Monroe (Aug. 25, 1796), *in* 35 *The Writings of George Washington from the Original Manuscript Sources 1745-1799*, at 189 (John C. Fitzpatrick ed. 1940) ("[N]o Nation had a right to intermeddle in the internal concerns of another."); see also *United States* v. *The La Jeune Eugenie*, 26 F. Cas. 832, 847 (D. Mass. 1822) (No. 15,551) (Story, J.) ("No nation has ever yet pretended to be the custos morum of the whole world; and though abstractedly a particular regulation may violate the law of nations, it may sometimes, in the case of nations, be a wrong without a remedy."); *Sosa*, 542 U.S. at 714 (explaining that law-of-nations violations between states "occupied the executive and legislative domains, not the judicial"); cf. *La Amistad de Rues*, 18 U.S. (5 Wheat.) 385, 390-391 (1820); *Juando* v. *Taylor*, 13 F. Cas. 1179, 1189 (S.D.N.Y. 1818) (No. 7558).

2. a. The question whether a cause of action should be fashioned today as a matter of federal common law in the circumstances of this case must take account of present-day principles governing judicial creation or recognition of private rights of action. In particular, it must take account of the principles underlying the pre-

sumption against extraterritorial application of federal statutes, especially where the alleged conduct has no substantial connection to or impact on the United States. That presumption is grounded in significant part on the concern that projecting U.S. law into foreign countries "could result in international discord." *EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). It reflects not only a judgment about the appropriate exercise of the United States' power to impose its law to govern conduct and afford remedies for injuries sustained in foreign countries, but also a corresponding respect for the sovereign authority of other states. See *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 542 U.S. 155, 164-165 (2004); see also *Morrison* v. *National Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877-2878, 2885-2886 (2010).

Those principles should inform the decision whether to recognize new federal common-law causes of action—especially under the ATS, the predominant purpose of which was to "avoid[], not provok[e], conflicts with other nations," *Tel-Oren*, 726 F.2d at 812 (Bork, J., concurring). In *Sosa*, this Court recognized that allowing U.S. courts to pronounce "a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits," would have "potential implications for the foreign relations of the United States" and would risk "adverse foreign policy consequences." 542 U.S. at 727-728. Indeed, the Court questioned whether a court should entertain "at all" a suit under the ATS seeking to enforce such a limit. *Id.* at 728. Foreign governments are typically immune from suit under the Foreign Sovereign Immunities Act of 1976 to adjudicate violations of international law they allegedly have committed, 28 U.S.C.

1604, 1605(a)(5) (2006 & Supp. IV 2010). See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 436-438 (1989) (no jurisdiction over foreign states under ATS); *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 351-353, 363 (1993) (Kingdom of Saudi Arabia immune from suit alleging torture by police). Yet here, although petitioners' suit is against private corporations alleged to have aided and abetted human rights abuses by the Government of Nigeria, adjudication of the suit would necessarily entail a determination about whether the Nigerian Government or its agents have transgressed limits imposed by international law.[4] Imposition of such liability would result from decisions of the Judiciary, which lacks the expertise of the political Branches to weigh the relevant considerations, and the jurisdiction of the courts would be invoked by private plaintiffs without "the check imposed by prosecutorial discretion," *Sosa*, 542 U.S. at 727, that the Executive can exercise in the criminal context.

Such ATS suits have often triggered foreign government protests.[5] The previous Government of Nigeria,

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[4] Respondents, moreover, are Dutch and British holding companies; the Nigerian subsidiary was dismissed from the suit for lack of personal jurisdiction. See Pet. App. A169-A170 (Leval, J., concurring only in the judgment). Recognition of a cause of action here could therefore require a U.S. court to opine on difficult questions of Dutch and British corporate law, including the availability and contours of veil-piercing liability, raising yet additional concerns. *E.g.*, *id.* at A181 n.55 (Leval, J., concurring only in the judgment).

[5] See, *e.g.*, Amici Br. of the Gov'ts of Australia & the United Kingdom, *Rio Tinto PLC* v. *Sarei*, No. 11-649; Amicus Br. of the Gov't of Canada, *Presbyterian Church* v. *Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (No. 07-0016); German Gov't View on the Balintulo v. Daimler AG Litigation, *Balintulo* v. *Daimler AG*, 09-2778 Docket entry (2d Cir. Oct. 13, 2009); Amici Br. of the Gov'ts of the Commonwealth of

for example, lodged an objection with the Attorney General in 2002 about this case. See J.A. 128-131.[6] That potential for friction is augmented where, as here, the defendant is a national or corporation of a third country. The Governments of the United Kingdom and the Kingdom of the Netherlands filed an amicus brief in this Court objecting to the "overly broad assertions of extraterritorial civil jurisdiction arising out of aliens' claims against foreign defendants for alleged activities in foreign jurisdictions." Amici Br. 2. The "great caution" urged in *Sosa* counsels against recognizing a federal common-law cause of action that has the inherent potential to provoke the international friction the ATS was designed to prevent.[7]

Australia, the Swiss Confederation, and the United Kingdom, *Sosa*, *supra* (No. 03-339); Amicus Br. of the Republic of South Africa, *Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (No. 05-2141), aff'd for lack of quorum *sub nom. American Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008); see also U.S. Amicus Br. App. at 1a-14a, *Ntsebeza*, *supra* (No. 07-919) (attaching diplomatic notes from the Republic of South Africa, the Government of the United Kingdom, the Federal Republic of Germany, and the Government of Switzerland).

[6] This Office has been informed by the Department of State that the current Government of Nigeria has expressed no views on this case.

[7] Petitioners rely on the "transitory tort doctrine." See, *e.g.*, Pet. Supp. Br. 9, 19-20, 23, 27-31, 39. That doctrine is based in part on the theory that "[a] state or nation has a legitimate interest in the orderly resolution of disputes among those within its borders," and courts have considered it to be "an expression of comity to give effect to the laws of the state where the wrong occurred." *Filartiga*, 630 F.2d at 885. Because "the only source of th[e] obligation is the law of the place of the act," however, it is that forum's "law [that] determines not merely the existence of the obligation, but equally determines its extent." *Slater* v. *Mexican Nat'l R.R.*, 194 U.S. 120, 126 (1904) (citation omitted). Thus, such cases would be heard, if at all, under the law of the foreign state.

b. Foreign relations concerns similar to those raised by this sort of case may also arise in cases in which the actual individual perpetrator, not an alleged aider and abettor, is the defendant and present in the United States. But there are countervailing interests in that situation. In *Filartiga*, for example, one of the alien plaintiffs was in the United States when she learned that the individual allegedly responsible for torturing and killing her brother in Paraguay was living in New York. See 630 F.2d at 878-879.[8] The Executive Branch suggested in that case that "a refusal to recognize a private cause of action" could "seriously damage the credibility of our nation's commitment to the protection of human rights." U.S. Amicus Mem. at 22-23, *Filartiga*, *supra* (No. 79-6090).

This case is quite different from *Filartiga*. The United States could not be viewed as having harbored or otherwise provided refuge to an actual torturer or other "enemy of all mankind." *Filartiga*, 630 F.2d at 890; see *Senate Report* 3 (noting that TVPA would ensure that torturers "will no longer have a safe haven in the United States"). When an individual foreign perpetrator is

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This case involves the distinct question whether a cause of action should be recognized as a matter of federal common law—*i.e.*, under the substantive and remedial law of the United States.

[8] After selling his house in Paraguay, the defendant in *Filartiga* arrived in the United States under a visitor's visa in July 1978. He remained beyond the term of his visa and, when the victim's sister learned of his whereabouts, she contacted immigration authorities, which led to his arrest. The defendant was served with the civil complaint while being held pending deportation, the order of which was stayed during the district court proceedings. After the district court's decision dismissing the complaint on jurisdictional grounds, and after the plaintiffs' additional requests for a stay were denied, the defendant was deported. See *Filartiga*, 630 F.2d at 878-880.

found residing in the United States, the perpetrator's ties to the U.S. are stronger and often more lasting, and the choice of forum and invocation of U.S. law by an alien residing in the United States may be entitled to more weight.[9] By contrast, respondents in this case are not exclusively present in the United States, even if they have sufficient contacts with the United States to establish personal jurisdiction. In such circumstances, other more appropriate means of redress would often be available in other forums, such as the principal place of business or country of incorporation. And if foreign nations with a more direct connection to the alleged offense or the alleged perpetrator choose not to provide a judicial remedy, the United States could not be faulted by the international community for declining to provide a remedy under U.S. law.

Congress, like the Executive Branch in *Filartiga*, concluded that U.S. interests would be served by allowing a private right of action to be brought for extraterritorial violations of the norm at issue in *Filartiga*. See *Senate Report* 3-5; see *House Report* 3-4. Faced with uncertainty as to whether victims like the Filartigas would be able to invoke the ATS in light of Judge Bork's concurring opinion in *Tel-Oren*, Congress created an express, but carefully circumscribed, cause of action available only against an individual for acts of torture or extrajudicial killing and only when acting under color of

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[9] The United States did not enter into widespread extradition treaties until the 1840s, and early American practice reflected an insular approach to fugitives. See Edward Clarke, *The Law of Extradition* 34-48 (4th ed. 1903). Indeed, in the famous Marbois incident, France had requested that De Longchamps be returned to France for punishment, but the Pennsylvania court refused. See *Respublica* v. *De Longchamps*, 1 U.S. (1 Dall.) 111, 115-116 (Pa. Oyer & Terminer 1784).

foreign law. See TVPA § 2(a), 106 Stat. 73; *Mohamad* v. *Palestinian Auth.*, 132 S. Ct. 1702, 1706 (2012) (holding that the TVPA authorizes suit only against natural persons).

Today, the Filartigas would have a cause of action under the TVPA. Petitioners, however, would not. In this sensitive context, courts engaged in judicial lawmaking should not recognize a cause of action that is significantly more expansive in this respect than the express extraterritorial cause of action created by Congress. The courts therefore should not create a cause of action that challenges the actions of a foreign sovereign in its own territory, where the defendant is a foreign corporation of a third country that allegedly aided and abetted the foreign sovereign's conduct.[10] The Court need not decide whether a cause of action should be created in other circumstances, such as where the defendant is a U.S. national or corporation, or where the alleged conduct of the foreign sovereign occurred outside its territory, or where conduct by others occurred within the U.S. or on the high seas.[11]

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[10] The question whether a cause of action should be recognized against respondents based on the aiding-and-abetting theory petitioners advance in this case raises additional questions. See *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). The aiding-and-abetting issue was briefed below, see U.S. Initial Amicus Br. 2-3, 13 n.6, and was addressed in the government's amicus brief in *American Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919). Because the Court's supplemental question presented did not invite briefing on that issue, the United States has not addressed aiding-and-abetting liability here.

[11] The United States in recent years has advanced a more categorical rule against extraterritoriality before this Court and the courts of appeals. See, *e.g.*, U.S. *Sosa* Br. at 46-50 (arguing that no cause of action may be recognized under the ATS for the conduct of foreign persons in

C. Exhaustion And Related Doctrines Should Apply With Special Force In Any ATS Action Involving Extraterritorial Conduct

If a federal common-law cause of action is created under the ATS for extraterritorial violations of the law of nations in certain circumstances, doctrines such as exhaustion and forum non conveniens should be applied at the outset of the litigation and with special force. Particularly where the nexus to the United States is slight, a U.S. court applying U.S. law should be a forum of last resort, if available at all.

1. In *Sosa*, the Court noted the possibility that ATS plaintiffs should be required to first exhaust "any remedies available in the domestic legal system, and perhaps in other forums," and stated that it "would certainly consider [such a] requirement in an appropriate case." 542 U.S. at 733 n.21. A suit brought by Nigerian plaintiffs against Dutch and British corporations based on the actions of Nigerian military and police forces in Nigeria is an appropriate case in which to adopt a mandatory exhaustion requirement.

By affording foreign states the opportunity to adjudicate claims arising within their jurisdiction (or involving their nationals), exhaustion demonstrates respect for foreign sovereigns and furthers the ATS's predominant purpose of avoiding international friction. Exhaustion may also mitigate (though not fully alleviate) the potential "adverse foreign policy consequences" inherent in

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foreign countries); U.S. Amicus Br. at 5-12, *Presbyterian Church* v. *Talisman Energy Inc.*, 582 F.3d 244 (2d Cir. 2009) (No. 07-0016) (arguing that no cause of action may be recognized under the ATS for conduct occurring in a foreign country). As explained in this brief, the government urges the Court not to adopt such a categorical rule here.

having a U.S. court determine whether "a foreign government or its agent has transgressed" limits "on the power of [that] foreign government[] over [its] own citizens." *Sosa*, 542 U.S. at 727-728.

Notably, when Congress has acted to provide an express private right of action for international law violations, it has required exhaustion as a prerequisite to suit. The TVPA provides that "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." TVPA § 2(b), 106 Stat. 73. The legislative history explains that exhaustion will "ensure[] that U.S. courts will not intrude into cases more appropriately handled by courts where the alleged torture or killing occurred. It will also avoid exposing U.S. courts to unnecessary burdens, and can be expected to encourage the development of meaningful remedies in other countries." *House Report* 5. Given the practical consequences of allowing a suit based on extraterritorial conduct to proceed, and in light of the great caution urged in *Sosa*, this Court should impose an exhaustion requirement in ATS cases that is at least as stringent as the one provided by Congress in the TVPA.[12]

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[12] A plurality of the en banc Ninth Circuit has rejected a mandatory exhaustion requirement in favor of the application of prudential exhaustion principles on a case-by-case basis. See *Sarei* v. *Rio Tinto, PLC*, 550 F.3d 822, 827-828 & n.4 (2008); cf. *id.* at 833 (Bea, J., concurring) (arguing in favor of a mandatory exhaustion requirement). Other courts of appeals have declined to require any exhaustion of local remedies. See *Jean* v. *Dorelien*, 431 F.3d 776, 781 (11th Cir. 2005); cf. *Flomo* v. *Firestone Natural Rubber Co.*, 643 F.3d 1013, 1025 (7th Cir. 2011) (rejecting exhaustion requirement as "ridiculous," but suggesting that some form of abstention based on comity concerns might be appro-

2. Other doctrines, such as forum non conveniens, should also be applied with special vigor in ATS cases. If the parties and the conduct have little connection to the United States, and an adequate alternative forum exists, courts should presumptively dismiss.

The doctrine of forum non conveniens requires an examination of whether an alternative forum exists and, if so, a weighing of private and public interest factors to determine whether dismissal is appropriate. See *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 241 n.6, 254 n.22 (1981); *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508-509 (1947). In other settings, courts apply a strong presumption in favor of a resident plaintiff's choice of forum. *Piper Aircraft*, 454 U.S. at 255-256; *id.* at 256 (non-resident "foreign plaintiff's choice [of forum] deserves less deference"). And some courts have treated the doctrine as "an exceptional tool," *Dole Food Co.* v. *Watts*, 303 F.3d 1104, 1118 (9th Cir. 2002) (internal quotation marks and citation omitted), to be used only in "rare instances," *Carey* v. *Bayerische Hypo-Und Vereinsbank AG*, 370 F.3d 234, 237 (2d Cir. 2004) (internal quotation marks and citation omitted).

In the ATS context, however, dismissal on forum non conveniens grounds should not be the rare exception. For the same reasons that plaintiffs should be required to exhaust all available local remedies (*i.e.*, the potential for international discord and the respect for foreign tribunals), courts should not look at forum non conveniens arguments with a skeptical eye. Rather, they should first determine whether an alternative and adequate forum exists. *Piper Aircraft*, 454 U.S. at 254 n.22. That

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priate). Accordingly, the Court should make clear that exhaustion is mandatory in every case unless futile.

requirement is ordinarily satisfied "when the defendant is 'amenable to process' in the other jurisdiction," *ibid.* (quoting *Gilbert*, 330 U.S. at 506-507), and only in "rare circumstances" would a remedy afforded by a foreign forum be so "clearly unsatisfactory" that it could be declared inadequate, *ibid.* For reasons of comity among nations, in suits based on the ATS, assertions that a foreign judicial system is inadequate should not be accepted absent a very clear and persuasive showing. Cf. *Munaf* v. *Geren*, 553 U.S. 674, 702 (2008).

If there is an alternative forum, the court should then weigh the relevant private and public interests. But, in the ATS context, courts should not apply a strong presumption in favor of a resident alien's choice of forum, and defendants should not have to demonstrate that the public and private interest factors "tilt[] strongly in favor of trial in the foreign forum," *Wiwa* v. *Royal Dutch Petroleum Co.*, 226 F.3d 88, 100 (2d Cir. 2000) (brackets in original; internal quotation marks and citation omitted), cert. denied, 532 U.S. 941 (2001).[13] A

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[13] In *Wiwa*, the Second Circuit reversed the district court's dismissal on forum non conveniens grounds in a case involving the same defendants and nearly identical facts as this case. See 226 F.3d at 92-93, 107; Pet. Supp. Br. 4 n.3, 56 n.47. The district court dismissed the action after concluding that Great Britain provided an adequate alternative forum and weighing the private and public interests. *Wiwa*, 226 F.3d at 92, 94. The court of appeals assumed that British courts provided an adequate alternative forum, but reversed after concluding that the public and private interest factors did not "tilt sufficiently strongly in favor of trial in the foreign forum." *Id.* at 101. That decision is flawed in at least two respects. First, in this context, the court afforded considerably too much deference to the plaintiffs' choice of forum. See *id.* at 101-103. Second, the court erroneously concluded that the TVPA expresses a policy in favor of entertaining ATS suits for torture in U.S. courts. See *id.* at 103-106.

more flexible application of forum non conveniens analysis that gives effect when possible to substantial interests of other sovereigns in adjudicating disputes over incidents occurring in their own territory, or involving their own nationals outside the United States, would help to mitigate the potential for international friction arising from the recognition of an extraterritorial cause of action based on the ATS.

3. The two doctrines highlighted above are not exhaustive. Personal jurisdiction over the defendant must be established. International comity, act of state, political question, "case-specific deference" (*Sosa*, 542 U.S. at 733 n.21), and other doctrines should also be applied, with reference to the special considerations just identified, whenever appropriate.

While there may be some overlap, the doctrines are also not mutually exclusive. If, for example, exhaustion of local remedies is considered futile because the place where the conduct occurred does not provide an adequate remedy, dismissal may still be warranted on forum non conveniens grounds because the place where the perpetrator resides does. Or, if a forum non conveniens dismissal is deemed inappropriate based on a balancing of private and public interests, mandatory exhaustion of local remedies may still be required. Courts should apply these doctrines at the outset of litigation, and in as expeditious a manner as possible, to ensure that foreign defendants are not subject to protracted legal proceedings in cases that are better litigated abroad.

CONCLUSION

Insofar as the Court addresses the recognition of a federal cause of action under the ATS based on actions occurring within the territory of a foreign sovereign, the judgment of the court of appeals should be affirmed. Insofar as the Court addresses whether a corporation can be a proper defendant in a suit under the ATS, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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